

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Michael J. Singer
Deerfoot Lodge & Resort Inc
3000 Dundee Rd
Ste 315
Northbrook IL 60062

PECFA Claim #54843-9150-40B
Hearing #00-544

Amended Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed June 16, 2000, under §101.02(6)(e), Wis. Stats., and COMM 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on October 23, 2001, at Madison, Wisconsin.

The issue for determination is: **Whether the department's decision dated April 4, 2000 was correct with regard to the disputed costs identified in petitioner's appeal received by the department on June 16, 2000.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Michael J. Singer
Deerfoot Lodge & Resort Inc
3000 Dundee Rd
Ste 315
Northbrook IL 60062

In Person
By Mr. Craig Johanesen
Environmental Compliance Consultants, Inc
P.O. Box 11417
Green Bay WI 54307

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Renee Dickey
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Acting Secretary dated September 26, 2001.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The appellant, Deerfoot Lodge and Resort, Inc. by Michael J. Singer, operates a year round resort on the property. The appellant submitted its claim for reimbursement of the costs it incurred in the remediation of the petroleum-contaminated site in question in the amount of \$5,523.22. Of that amount, the Wisconsin Department of Commerce (department) denied \$140.18, which was responsible for administering the PECFA program, in a letter entitled Breakdown of PECFA Costs dated April 4, 2000. The appellant submitted an appeal that was received by the department on June 16, 2000 for the following item: low bidder for PECFA eligible lab services was not used.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stats. §101.143(3)(f) provides, in part, as follows:

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system:

4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.

Wisconsin Admin Code ILHR 47.30 provides, in part, as follows:

(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In

order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(c) Costs for testing or sampling unrelated to the investigation for the extent of contamination under the scope of this chapter:

1. Costs for sampling and testing for heavy metals, except lead testing when the discharge is verified to be from leaded gasoline, or lead and cadmium when the source is used motor oil;
2. Costs associated with the analysis for inappropriate constituents not normally part of or associated with an eligible petroleum product even if required by the DNR; and

Wisconsin Admin. Code ILHR 47.33(1)(b)2 provides, in part, as follows:

2. Consulting firms may elect to bid laboratory services on a calendar-year basis in order to obtain volume discounts and reduce the number of bids that shall be completed for each remediation. In completing the competitive bid process, the consulting firm shall obtain a minimum of 3 written bids. The lowest bid shall be accepted. All discounts, rebates and savings shall be reflected in the PECFA claim.

Wisconsin Admin. Code COMM 47.33(1)(b)2 provides, in part, as follows:

2. Consulting firms may elect to bid laboratory services on a calendar-year basis in order to obtain volume discounts and reduce the number of bids that shall be completed for each remediation. In completing the competitive bid process, the consulting firm shall obtain a minimum of 3 written bids, from qualified firms that respond to the specifications and estimated volume of work provided by the consulting firm. Only PECFA-eligible laboratory work shall be included in the analysis to determine the lowest cost service provider. The lowest bid shall be accepted. All discounts, rebates and savings shall be reflected in the PECFA claim.

DISCUSSION

The department denied reimbursement of the cost of the lab services provided by EnChem on invoice #019705031 based upon the assertion that the lab selected was not the low annual lab bidder for the period (1997) due to the presence of PECFA non-eligible analytes (BIO 2-4) as part of the annual lab bid comparison. The department pointed to the relevant sections of the administrative code and Update 2 dated October 20, 1993 and Update 13 dated March 5, 1998 as instructive on the point of bids for commodity services not including non-eligible costs and the method that should be used in selecting a lab for annual services. The department explained that Updates are designed to provide guidance and are disseminated to the consultants that are registered with the PECFA program.

The appellant's representative contended that, although there were ineligible non-petroleum related analytes contained in the testing in question (for example reactive cyanide and sulfides), he did not request that any of the non-eligible analytes (BIO 2-4) be included in the sampling for this site. The consultant further contends that the costs of running the BIO testing is cheaper than running the individual constituent tests for eligible analytes and that by running these tests for eligible parameters "it saved the fund money." The consultant acknowledged that the annual bid documents from the three bidders were provided to the department as part of the application materials for determining reimbursement eligibility.

The appellant's representative's contention is conditioned on the concept that although the ineligible parameters were included in the annual lab bid documents submitted for reimbursement the ineligible parameters were never run for this site and never charged to the PECFA program. Therefore, since these costs for non-eligible parameters were ever incurred, they should not be considered in any comparison done by the department as to which lab was the low cost provider. This contention is contrary to the applicable sections of the code as well as the guidance provided in Update 2. ILHR 47.33(1)(b)2 was in effect at the time the activities were completed in 1997. The code section does not specifically address the issue of non-eligible items being included in the annual bid comparisons. However, this section does instruct that the "lowest bid shall be accepted." The code also instructs that the following items are ineligible for reimbursement "Costs associated with the analysis for inappropriate constituents not normally part of or associated with an eligible petroleum product." When these are taken together and considered with the long-standing guidance provided in Update 2, it is apparent that ineligible parameters should not and cannot be included in an annual lab bid. The PECFA grant reviewer removed the ineligible parameters from the annual lab bids for all of the bidders and recalculated the bids. In so doing, she found that the lab selected was not the lowest annual bidder for the period in issue. The appellant's representative admits that the annual lab bid documents for the three bidders that were submitted with the claim contained ineligible parameters. The appellant's representative fails to give sufficient weight to the department's method whereby comparison of the bids is accomplished once you remove the ineligible items. When the department made this comparison, a different lab was identified as the low annual bidder for the period. Therefore, the appellant has not established that the commodity provider used was the lowest bidder and that the PECFA program should reimburse the cost.

CONCLUSIONS OF LAW

The appellant was an owner or agent of a property covered by the remedial provisions of Wis. Stats. 101.143.

The department was correct in denying reimbursement of costs totaling \$133.00 associated with the use of a commodity provider that was not the lowest cost alternative within the meaning of ILHR 47.33(1)(b)2.

DECISION

The department's decision to deny reimbursement for the cost of lab costs is affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

John A. Kisiel
Administrative Law Judge
Department of Commerce
PO Box 7838
Madison WI 53707-7838

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Date Mailed: _____

Mailed By: _____